THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MARTHA COAKLEY
ATTORNEY GENERAL

(617) 727-2200
www.ago.state.ma.us

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Deborah Goddard, General Counsel
Department of Housing & Community Development
100 Cambridge Street, Suite 300
Boston, MA 02114

Michael Rabieh, Esq.
Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110-3333

Kurt A. James, Esq.
Theodore C. Regnante, Esq.
Affordable Housing Committee
Real Estate Bar Association
50 Congress Street, Suite 600
Boston, MA 02109

Re: Initiative Petition No. 07-02: Initiative Petition for a Law Relative to Comprehensive Permits and Regional Planning

Dear Counsel:

I am writing on behalf of Attorney General Martha Coakley to thank you for assisting, on behalf of the Department of Housing & Community Development, Massachusetts Housing Finance Agency, Massachusetts Housing Partnership, Citizens' Housing and Planning Association, Fair Housing Center of Greater Boston, Lawyers Clearinghouse on Affordable Housing and Homelessness, Inc., Massachusetts Law Reform Institute, Massachusetts Association of Community Development Corporations, Uniting Citizens for Housing Affordability in Newton, and the Affordable Housing Committee of the Real Estate Bar Association, in our review of the above-referenced initiative petition. This letter will explain why, after careful consideration of your arguments in opposition to the petition, Attorney General Coakley has nevertheless concluded that she must certify the petition under Mass. Const. amend. art. 48. She has asked me to emphasize that, as with all initiative petitions she must review, her certification decision is based strictly on the legal criteria set forth in art. 48 and does not reflect any policy views she may have on whether the proposed law is a desirable one.

The proposed law would repeal Sections 20 through 23 of Chapter 40B of the

Massachusetts General Laws, known as the "Low and Moderate Income Housing Act." You have suggested that the proposed law is "inconsistent with the right to receive compensation for private property appropriated to public use" and thus excluded from the initiative process. See art. 48, Init., pt. 2, § 2 ("No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: . . . the right to receive compensation for private property appropriated to public use . . . .").

A proposed law may be "inconsistent with the right to receive compensation for private property appropriated to public use," if it "would, if enacted, effect a taking" of private property. See Dimino v. Attorney General, 427 Mass. 704, 708 (1998).[1] The relevant test for a taking of private property is set forth in Gove v. Zoning Bd of Appeals of Chatham, 444 Mass. 754 (2005). The first inquiry under Gove is whether the law or regulation works a "permanent physical invasion" of the property or "completely deprive[s] an owner of all economically beneficial use of [the] property" such that the remaining property is rendered "valueless" or "economically idle" or that the property owner is left with nothing more than a "token" interest. Id. at 762. If there is no such "total" taking, the inquiry shifts to the Penn Central test, which is a case-by-case, fact-based evaluation. See Gove, 444 Mass. at 763-64. Under the Penn Central analysis, the court will look for "important guideposts" that signal a taking, such as the economic impact of the regulation, the extent to which the regulation has interfered with a plaintiff's distinct investment-backed expectations, and the character of the governmental action. Id. at 764.

To the extent a fact-intensive individualized determination is required by the Gove/Penn Central analysis to evaluate whether a "taking" has occurred, that type of consideration is beyond the scope of the Attorney General's certification responsibilities under art. 48. See Yankee Atomic Electric Company v. Secretary of the Commonwealth, 403 Mass. 203, 206, 209 (1988) (citations omitted) (in reviewing petitions, the Attorney General should consider only those facts that are officially noticeable or implicit in the language of the petition itself; "We conclude that at least some of the relevant inquiries which may arise in the ultimate determination whether a taking of property has occurred will involve the kind of lengthy factual determinations which art. 48 does not require or allow to the Attorney General at this time."). Therefore, the Attorney General cannot deny certification to the proposed law on the basis that, if enacted, its effect on a particular piece of land may be to render that land valueless. Such a determination necessarily requires examination of all relevant factors relating to the land, including residual available uses. See Gove, 444 Mass. at 764-65 (plaintiff landowner failed to

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[1] As some of you have noted, the proposed law on its face does not include a compensation mechanism. Because, however, the Attorney General has concluded that the proposed law would not work a taking of private property, the absence of a compensation mechanism is of no significance.

prove that prohibition against building residential structure on her land rendered land valueless).[2]

Some of you have argued that the "private property" that would be "taken" by enactment of the proposed law is any comprehensive permit that had already been issued at the time the repeal becomes effective (if a building permit has not also been issued).[3] We have not, however, found or been provided firm authority for the proposition that a Chapter 40B comprehensive permit is "private property" that may be "taken" by the government such that compensation would be required. Such a conclusion would not appear to be supported by the limited nature of the rights granted by a Chapter 40B comprehensive permit.

As a general rule, licenses and permits are not considered "private property" for purposes of takings analysis. See American Pelagic Fishing Co., L.P. v. United States, 379 F.3d 1363, 1373 (Fed. Cir. 2004). In determining whether a license or permit is "private property," courts consider whether the license or permit may be transferred, whether it grants exclusive rights, and whether the government retains the ability to revoke it. See id. at 1374 (no property interest in fishing permits that do not grant exclusive privileges, cannot be transferred, and can be revoked); Members of the Peanut Quota Holders Ass'n, Inc. v. United States, 421 F.3d 1323, 1330 (Fed. Cir. 2005) ("hallmark rights of transferability and excludability" signal compensable property interest); cf. Jackson v. United States, 103 F. Supp. 1019, 1020 (Ct.Cl. 1952) (license to conduct commercial fishing in Chesapeake Bay was "private property" where license granted exclusive fishing rights, was annually renewable as of right, and could be sold or devised).

These factors, when applied to Chapter 40B comprehensive permits, militate against a conclusion that the permits are "private property." First, under the regulations of the Housing Appeals Committee, a comprehensive permit, once issued, cannot be transferred by its holder absent approval of the Committee. 760 C.M.R. 31.08(5). Next, although there are no published cases addressing revocation of a Chapter 40B comprehensive permit, permit holders may remain

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[2] The decision to certify the proposed law for the ballot does not foreclose the possibility of a successful takings claims based on a fuller factual record if the proposed law is enacted. See Associated Indus. of Massachusetts v. Attorney General, 418 Mass. 279, 287 (1994) ("Challenges on a more substantial factual record may appropriately be advanced when and if the people adopt a proposal. . . . . A challenge to a decision to allow a proposed initiative on the ballot is only the first opportunity to mount constitution-based attacks on the law.") (citing Yankee Atomic Electric Company v. Secretary of the Commonwealth, 403 Mass. 203, 212 n.9 (1988)).

[3] Under the terms of the proposed law, already-issued comprehensive permits could be affected by the repeal of G.L. c. 40B, §§ 20-23, only if a building permit for at least one dwelling unit had not been issued as of the effective date of the repeal. See Initiative Petition No. 07-02, § 2.

subject to the conditions of Chapter 40B indefinitely. See Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Limited Partnership, 436 Mass. 811, 827 (2002). Presumably, therefore, permits could be revoked for failure to comply with applicable legal requirements. Finally, nothing in Chapter 40B or Housing Appeals Committee regulations grants exclusive development rights by limiting the number of comprehensive permits that can be issued in a particular municipality or neighborhood. Compare Members of the Peanut Quota Holders Ass'n, 421 F.3d at 1333 (no compensable property interest in license where total number of available licenses is not fixed) with Boothroyd v. Zoning Bd of Appeals of Amherst, 449 Mass. 333, 341 (2007) (local zoning board of appeals may issue comprehensive permits even after municipality has attained its minimum affordable housing obligation).[4]

In your memoranda of law, you have provided us with many case citations aimed at establishing that a Chapter 40B comprehensive permit should be considered "private property" for takings purposes. Our review of those cases, however, reveals them to be concerned with assessing the nature of property interests in the procedural due process arena. See, e.g., Welch v. Paicos, 66 F. Supp. 2d. 138, 163 (D. Mass. 1999). An interest that is "property" for procedural due process purposes such that notice and the opportunity for a hearing are required before the property may be affected by government action does not necessarily (and in many instances clearly does not) entitle the holder of the interest to monetary compensation as a result of that action.

You have also argued that zoning law, through G.L. c. 40A, § 6, creates vested rights by "freezing" zoning requirements for a period of time after a permit has been issued, and that comprehensive permits issued under Chapter 40B should be similarly protected. Such a "safe-harbor" provision does not, however, appear in Chapter 40B, and we are not aware of any authority holding that such grandfathering of previously issued permits is constitutionally required in order to prevent a taking. Moreover, even if such a provision were part of Chapter 40B, it would at most protect a particular project from retroactive application of government action, see R.V.H., Third, Inc. v. State Lottery Comm'n, 47 Mass. App. Ct. 712, 716 (1999), but would not establish that a comprehensive permit is private property for takings purposes.

For all these reasons, we are not persuaded that a Chapter 40B comprehensive permit constitutes "private property" for takings purposes. A conclusion by the Attorney General that Chapter 40B comprehensive permits are private property for takings purposes would be a marked extension of existing law. Therefore, denial of certification on this basis would not be appropriate. See Associated Indus., 418 Mass. at 291 (because the purpose of art. 48 is "to

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[4] Additionally, a comprehensive permit will lapse if construction authorized under it is not commenced within three years of the permit becoming final. See 760 C.M.R. 31.08(4). This restriction on the exercise of the permit underscores the limited nature of the rights it grants and weighs against a conclusion that the permit is "private property" for takings purposes.

permit the people to participate directly in the legislative process," a proposal should appear on the ballot unless it is "reasonably clear that [it] contains an excluded matter").

We hope this letter is helpful to you and the organizations you represent in understanding the basis for Attorney General Coakley's certification of this petition and the care with which we considered these important issues. We thank you again for your participation in the certification process, including your comments on the draft summary circulated by our office. A copy of the final summary is enclosed for your information.

Please feel free to call me or Assistant Attorney General Juliana Rice if you would like to discuss this matter further.

Very truly yours,

Peter Sacks
Deputy Chief, Government Bureau
(617) 727-2200, ext. 2064

Enc.

cc: Martha Coakley, Attorney General

John V. Belskis
196 Wollaston Avenue
Arlington, MA 02476

Jonathan D. Witten, Esq.
Daley and Witten, LLC
156 Duck Hill Road
Duxbury, MA 02332

Jason R. Talerman, Esq.
c/o Municipal Coalition for Affordable Housing
P.O. Box 1084
Berlin, MA 01503

Jason R. Talerman, Esq.
Blatman, Bobrowski & Mead, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742